83-2113

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

NO. _____

DOCK LEE MINTER,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO TEXAS COURT OF CRIMINAL APPEALS

KELLY L. NEWMAN
P. O. Box 986
Lufkin, Texas 75901
(409) 639-2238
Counsel for Petitioner

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

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QUESTION PRESENTED

WHETHER THE PETITIONER WAS DENIED HIS RIGHT TO THE ASSISTANCE OF COUNSEL IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

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v.

THE STATE OF TEXAS,
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PETITION FOR WRIT OF CERTIORARI TO TEXAS COURT OF CRIMINAL APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Dock Lee Minter, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Texas Court of Criminal Appeals at Austin, Texas, which was entered in this cause on April 25, 1984.

OPINIONS BELOW

The opinion of the Texas Court Of Criminal Appeals is printed in Appendix A, hereto, infra, Page A-1. The

judgment of the Trial Court, being the District Court of Montgomery County, Texas, is printed in Appendix B, hereto, infra, Page B-1.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered on the 25th day of April, 1984. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the construction and application of the Sixth Amendment of the United States Constitution which applies to the States through the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

The Petitioner was convicted of Voluntary Manslaughter in the District Court of Montgomery County, Texas. Punishment was assessed at 12 years confinement in the Texas Department of Corrections.

After his conviction, Petitioner appealed his conviction to the Texas Court of Criminal Appeals. The Texas Court of Criminal Appeals affirmed the conviction. Petitioner seeks this review in this Court of the decision of the Court below, because of his abiding belief that he has been branded a criminal and incarcerated without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

REASON FOR GRANTING THE WRIT

THE PETITIONER WAS DENIED HIS RIGHT TO THE ASSISTANCE OF COUNSEL AT THE TIME OF HIS CONVICTION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Petitioner was convicted in violation of his constitutional right to the assistance of counsel guaranteed to him by the Sixth Amendment to the United States Constitution which applies to the States through the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The Petitioner was represented by counsel in the Trial Court, but his attorney was incompetent and failed to represent Petitioner adequately. Such incompetent representation or lack of representation resulted in the Petitioner being tried, in effect, without assistance of counsel.

In this respect, Petitioner would show that the State was allowed to ask improper "have you heard" questions of the Petitioner's reputation witnesses. The record shows that during the punishment phase of the trial, the Petitioner presented four witnesses who testified that Petitioner had a good reputation for being a peaceable and law abiding citizen. During its cross-examination of each of these witnesses, the State's attorney propounded a "have you heard" question as to the arrest of Petitioner for sexual molestation of a 16 year old girl. Defense counsel made no objection to any of these questions. Instead, he recalled the Petitioner to the stand and Petitioner denied he had been arrested for sexual molestation. At the conclusion of the presentation of the evidence on

punishment, defense counsel moved that the Trial Court instruct the jury to disregard the "have you heard" questions. The Trial Court overruled Petitioner's motion. The Texas Court of Criminal Appeals held that Petitioner failed to preserve this ground of error for review in that no timely objections were made to these questions at the time they were asked.

In addition, Petitioner was denied the effective assistance of counsel when his defense attorney in the Trial Court permitted a juror to serve even though it was revealed that she was related by marriage to two of the State's witnesses. During the voir dire examination of the jury, the panel as a whole was asked if they knew any of the State's witnesses. The list of witnesses was read including the name of the Pitcock brothers. During the voir dire examination, the juror indicated that she might be related by marriage to the Pitcock brothers but was not sure. The Petitioner's attorney voiced no objection to that juror serving on the jury even after he was aware that she might be related to the Pitcock brothers. However, after she was sworn in as a juror, it was determined that she was, in fact, related by marriage to the Pitcock brothers.

Moreover, Petitioner was denied the effective assistance of counsel when his trial attorney allowed the State to present damaging evidence without objection even though such evidence violated the Court's order granting a motion in limine. The State was permitted to prove that an altercation involving the two parties occurred some three hours before the victim was killed by the Petitioner. Defense counsel filed a motion in limine to exclude such evidence and the motion was granted by the Court.

However, during the direct testimony of the State's key witness, Richard Pitcock, the prior event was mentioned several times. Defense counsel offered no objection. Petitioner's trial attorney did not object to this line of questioning until a substantial amount of damaging testimony was heard by the jury. When defense counsel finally did object, he voiced only a general objection. The objection was overruled as being untimely and too general. The failure to make a proper and timely objection by defense counsel allowed prejudicial evidence to be received by the Court and heard by the jury.

The right of the accused in a criminal prosecution to assistance of counsel under the Sixth Amendment to the Constitution is made obligatory upon the States by the Fourteenth Amendment. *Escobedo v. Illinois,* 371 U.S. 478. The right of one charged in a State court with a felony to assistance of counsel is protected by the Fourteenth Amendment of the Federal Constitution. *Williams v. Kaiser,* 323 U.S. 471, 65 S.Ct. 363. Denial of the effective assistance of counsel to one charged with crime violates due process. *Hawk v. Olson,* 326 U.S. 271, 66 S.Ct. 116. Where the denial of the constitutional right to assistance of counsel is asserted, its peculiar sacredness demands that the court scrupulously review the record. *Avery v. Alabama,* 308 U.S. 444, 60 S.Ct. 321. A defendant facing felony charges is entitled to the effective assistance of competent counsel, and the defendant cannot be left to the mercies of incompetent counsel. *McMann v. Richardson,* 397 U.S. 759, 90 S.Ct. 1441. Inadequate assistance of counsel does not satisfy the Sixth Amendment right to counsel made applicable to the States through the Fourteenth Amendment. In addition to requiring the States to appoint counsel for indigent de-

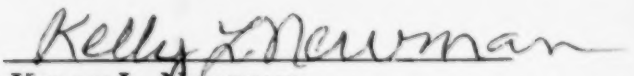
fendants, the right to counsel in the Sixth Amendment prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance. *Cuiler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708. The Supreme Court has consistently held that the right of a criminal defendant to the representation of adequate and competent counsel is constitutionally protected. 3 A.L.R. 4th 601.

If Petitioner had been represented by a zealous and competent attorney, his attorney would have objected to the juror in question and would have objected to the prejudicial and improper evidence. A vigorous defense by competent counsel would have prevented a juror from serving on the jury in this case where it obviously appeared that such juror might be prejudiced against the accused. Had the Petitioner been represented by competent counsel, he would have prevented improper evidence from being heard by the jury and would have presented Petitioner's defense in a more favorable light to the jury, which might have resulted in a different verdict. Although we will never know what the result might have been had Petitioner been represented by competent counsel, the point remains that the Petitioner at least would have had a fair chance. By being denied the effective assistance of counsel, Petitioner was also denied a fair trial by an impartial jury whose decision should have been based solely upon competent and admissible evidence. Thus, when all the facts and circumstances are taken into consideration, it leads to the conclusion that this Petitioner was denied his right to the effective assistance of counsel secured by the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the reasons set forth in this Application, Petitioner prays this petition be granted and Writ Of Certiorari issue to review the decision and judgment of the Texas Court of Criminal Appeals.

Respectfully submitted,



KELLY L. NEWMAN
P. O. Box 986
Lufkin, Texas 75901
(409) 639-2238
State Bar Number 14961000

Attorney for Petitioner

APPENDIX A

NO. 65,412

DOCK LEE MINTER,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Appeal from Montgomery County

OPINION

This is an appeal from a conviction for voluntary manslaughter. Punishment was assessed at twelve years confinement.

At approximately 1:15 a.m. on November 2, 1977, the deceased and the two Pitcock brothers went to the appellant's bar in Willis. Although versions of the forthcoming events differ, the episode ended when the appellant took his shotgun outside and attempted to evict the victim and his companions from the premises. Words were exchanged and shots were fired by both the victim and appellant. In the end, the victim was shot by appellant and died soon thereafter.

In his first ground of error appellant contends that reverisble error was committed when the State was allowed to ask improper "have you heard" questions of the appellant's reputation witnesses. The record shows that during the punishment phase, the appellant presented four witnesses who testified that appellant had a good

reputation for being a peaceable and law-abiding citizen. During its cross-examination of each of these witnesses, the State propounded a "have you heard" question as to the arrest of appellant for the sexual molestation of a sixteen-year-old girl. Defense counsel made no timely objection to any of the these questions. Instead he recalled the appellant to the stand and appellant denied he had been arrested for sexual molestation. At the conclusion of the presentation of the evidence on punishment, defense counsel moved that the trial court instruct the jury to disregard the "have you heard" questions. The trial court overruled appellant's motion. We find that appellant has failed to preserve this ground of error for review in that no timely objections were made to these questions at the time they were asked. Barecky v. State, 639 S.W.2d 943 (Tex. Cr. App. 1982); Beal v. State, 520 S.W.2d 907 (Tex. Cr. App. 1975); Rich v. State, 510 S.W.2d 596 (Tex. Cr. App. 1974).

Furthermore, even if appellant had properly objected, there was no error. "Have you heard" questions may be asked by the State to test the witness' knowledge if the prosecutor asks the question in good faith believing it has some basis in fact. Starvaggi v. State, 593 S.W.2d 323 (Tex. Cr. App. 1979); Stone v. State, 583 S.W.2d 410 (Tex. Cr. App. 1979), and cases cited therein. Evidence introduced at the hearing on appellant's motion for new trial shows that prior to asking the "have you heard" questions the State had contacted law enforcement authorities in Houston County who informed the State that appellant had been arrested for sexual molestation of a child and public intoxication after the mother of the child found both appellant and the child naked in the child's bedroom at 6:30 a.m. These facts are sufficient

to show good faith on the part of the State in asking the questions. This ground of error is overruled.

Appellant also contends that the trial court erred in permitting juror Linda Auld to serve when it was revealed that she was related by marriage to two State's witnesses. During voir dire of the jury, the panel as a whole was asked if they knew any of the State's witnesses. The list of witnesses was read including the names of the Pitcock brothers. Mrs. Auld did not indicate that she knew the Pitcock brothers. After the jury was empaneled and sworn, Mrs. Auld was called as a witness on voir dire. During questioning by defense counsel, she testified that her husband's father had been married for a short time to a Mrs. Pitcock. Mrs. Auld stated that she did not know if the Pitcock brothers were related to her father-in-law's former wife and she had never had any dealing with the Pitcock brothers. At the end of this questioning, defense counsel offered no objection to Mrs. Auld serving on the jury. During the hearing on appellant's motion for new trial, Mrs. Auld was again called as a witness. Once again she testified that she had never met the Pitcock brothers and she was not aware that they were related to her father-in-law's ex-wife until she was called to testify *after* being sworn in as a juror. Finally, Mrs. Auld testified that this relationship by marriage had no impact on her deliberations as a juror.

Appellant now argues that he was denied a peremptory challenge because Mrs. Auld intentionally concealed her relationship with the two Pitcock brothers. As noted above, appellant voiced no objection to Mrs. Auld serving on the jury even after he was aware she was related to the Pitcock brothers by marriage. In Acosta v. State,

522 S.W.2d 528 (Tex. Cr. App. 1975), the defendant exercised one of his peremptory challenges by striking Mrs. James L. Byrd. When the jury was empaneled, Mrs. Byrd's name was mistakenly called and she was seated in the jury box. When the trial court inquired if there were any objections to the panel as selected, the defendant replied that he had no objections. Only after the jury had returned its verdict of guilty did Acosta realize the mistake. At that time he moved for a mistrial. In its opinion, this Court enunciated the standard that must be used in reviewing cases where the defendant wishes to remove a juror who has already served as a member of the jury which has returned a verdict of guilt before any objection is raised as to his or her presence on the jury. The Court examined Mrs. Byrd's testimony on voir dire and determined that it did not constitute an affirmative showing that Mrs. Byrd was prejudiced.

Applying that standard in the instant case, we also find that there is no affirmative showing of prejudice. Mrs. Auld continually reiterated that she had never met the Pitcock brothers and although she was related to them distantly through marriage, this would have no effect on her service as a juror in this case.

Furthermore, there is no showing in the record that Mrs. Auld withheld information. She testified that when the panel was asked during the initial voir dire examination whether anyone knew the Pitcock brothers, she did not connect them with her ex-mother-in-law. Thus the facts of the instant case do not bring it within the rulings announced in Von January v. State, 576 S.W.2d 43 (Tex. Cr. App. 1978), and Salazar v. State, 562 S.W.2d 480

(Tex. Cr. App. 1978). Appellant's ground of error is overruled.

Finally, appellant complains that the trial court erred in permitting the State to elicit testimony concerning a fight involving several individuals which occurred earlier in the evening in the bar outside of which the deceased was later killed. The evidence about which appellant complains showed that some three hours before the victim was killed a fight broke out in appellant's bar. The fight initially began as a disagreement between appellant's cousin, Lucky, and Lucky's ex-wife. However, after Lucky pushed his ex-wife into a pool table, several bystanders got involved and a fistfight lasting several minutes ensued. The melee ended after appellant got out his shotgun, pointed it at the ceiling and told everyone to settle down. Testimony showed that the victim was in the bar at the time, although he did not get involved in the fight between Lucky and his ex-wife. However, shortly after that fight ended, appellant stopped a small scuffle that had broken out between the victim and two other individuals.

Prior to trial, the court granted appellant's motion in limine concerning this prior altercation. However, during the direct testimony of State's witness, Richard Pitcock, these prior events were alluded to several times. Appellant offered no objection. During cross-examination of appellant's cousin, the State, out of the presence of the jury, asked the court for permission to go into the prior altercation. The court ruled that the State could question the witness regarding this altercation. Appellant did not object to this line of questioning until a substantial amount of testimony relative to the incident was completed. When

defense counsel finally did object, he voiced only a general objection.

In his brief, appellant seems to contend he preserved error by virtue of his motion in limine. However, reliance on a motion in limine will not preserve error. A defendant must make a timely motion on the proper grounds when the evidence is offered at trial. Romo v. State, 577 S.W.2d 251 (Tex. Cr. App. 1979). As noted above, when appellant finally did object to the testimony, his objection was untimely and too general. Pena v. State, 640 S.W.2d 295 (Tex. Cr. App. 1982). Thus no error was preserved. This ground of error is overruled.

The judgment is affirmed.

Per Curiam

(Delivered April 25, 1984)

En Banc

APPENDIX B

MINUTES CRIMINAL DISTRICT COURT, MONTGOMERY COUNTY, TEXAS AT JANUARY TERM, A.D. 1979

JUDGMENT OF CONVICTION PLEA NOT GUILTY

BE IT REMEMBERED, That on Monday, the 1st day of January 1979, there came on and was held a regular term of the Honorable District Court of Montgomery County, Texas, at the Court House thereof, at Conroe, Texas.

Present and presiding: Hon. Lee G. Alworth, Judge, 221st District Court of Montgomery County; James Keeshan, District Attorney; R. J. Gray, District Clerk, and A. E. Reaves, Sheriff.

No. 13,284

THE STATE OF TEXAS

vs.

DOCK LEE MINTER

(February 8, 1979)

Indicted for MURDER

THIS DAY this cause was called for trial, and the State appeared by her District Attorney, and the Defendant, Dock Lee Minter, appeared in person and by

Counsel, George W. Morris, and both parties announced ready for trial; and the Defendant in open Court pleaded not guilty to the charge contained in the Indictment herein; and thereupon a jury, to-wit: R. B. Fair and eleven others, was duly selected, empaneled and sworn, according to law, who, having heard the indictment read, and the defendant's plea of not guilty thereto; and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer, the Defendant being present, and in due form of law returned into open Court the following verdict, which was received by the Court, and is here now entered upon the minutes of this Court, to-wit:

> "We, the Jury, find the defendant, DOCK LEE MINTER, Guilty of the offense of Voluntary Manslaughter. /s/ R. B. Fair, Foreperson of the Jury"

It is, therefore, considered and adjudged by the Court that the Defendant Dock Lee Minter is guilty of the offense of Voluntary Manslaughter as found by the jury, and that he be punished, as has been determined, by confinement in the State penitentiary for a term of Twelve (12) years, and that the State of Texas do have and recover of said Defendant, Dock Lee Minter, all costs in the prosecution expended, for which execution will issue, and that said Defendant be remanded to jail to await the further order of this Court herein.

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SENTENCE

No. 13,284

THE STATE OF TEXAS

vs.

DOCK LEE MINTER

(April 5, 1979)

THIS DAY this cause being again called; the State appeared by her District Attorney and the Defendant, Dock Lee Minter, was brought into open Court in person, in charge of the Sheriff, for the purpose of having the sentence of the law pronounced in accordance with the verdict and judgment herein rendered and entered against him on another day of this term.

And thereupon the Defendant, Dock Lee Minter, was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant, Dock Lee Minter, to pronounce sentence against him as follows, to-wit: "It is the Order of the Court that the Defendant, Dock Lee Minter, who has been adjudged to be guilty of Voluntary Manslaughter whose punishment has been assessed by the verdict of the jury at confinement in the State penitentiary for Twelve (12) years, to be delivered by the Sheriff of Montgomery County, Texas, immediately to the superintendent of the penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and said Dock Lee Minter shall

be confined in said penitentiary for a term of not less than Two (2) years, nor more than Twelve (12) years in accordance with the provisions of the law governing the penitentiaries of said State."

And the said Dock Lee Minter is remanded to jail until said Sheriff can obey the directions of this sentence. It is further ordered by the Court that the Defendant be credited on this sentence with on account of the time spent in jail in said cause since his arrest and confinement until sentence was pronounced by this Court.

/s/ LEE G. ALWORTH
Lee G. Alworth, Judge Presiding

A true and correct copy, I hereby certify, as the same appears in Vol. 6, Page 35 of the Criminal Records in the District Clerk's office in Montgomery County, Texas.

Peggy Stevens, District Clerk

By /s/ JUDY WOOD, Deputy